NO. S222996

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

MARK LAFFITTE, *et al.*,

Plaintiffs and Respondents,

vs.

ROBERT HALF INTERNATIONAL, INC., *et al.*,

Defendants and Respondents,

DAVID BRENNAN,

Plaintiff and Appellant.

After a Decision of the Court of Appeal,
Second Appellate District, Div. Seven, No. B249253;

Los Angeles Superior Court, Stanley Mosk Courthouse, Case No. BC 321317
[related to BC 455499 and BC 377930],
Hon. Mary H. Strobel, Presiding Judge, Dept. 32

APPELLANT'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

State Cases **Page**

TABLE OF AUTHORITIES

State Cases **Page**

TABLE OF AUTHORITIES

State Cases **Page**

Federal Cases **Page**

TABLE OF AUTHORITIES

Federal Cases **Page**

Statutes, Codes and Rules **Page**

TABLE OF AUTHORITIES

Texts, Treatises, and Other **Page**

ISSUE PRESENTED

The issue certified for review is "Does this Court's seminal decision in *Serrano v. Priest (Serrano III)*, 20 Cal.3d 25 [141 Cal.Rptr. 315] (Oct. 4, 1977), permit a trial court to anchor its calculation of a reasonable attorney's fees award in a class action on a percentage of the common fund recovered?"

INTRODUCTION

As this brief will make clear, the answer to the question posed by the Court is clearly "No."

The essential problem this Court confronted in 1977 was excessive attorneys' fee awards. As the First Appellate District's *Lealao* court explained, *Serrano III's* purpose was to correct the problem of attorneys' fee awards that were "excessive and unrelated to the work actually performed by counsel." *Lealao v. Beneficial California, Inc.*, 82 Cal.App.4th 19, 28 n.2 [97 Cal.Rptr.2d 797] (1st App. Dist. July 10, 2000) (citation omitted).

In 1977, the lodestar approach and the percentage-of-the-recovery approach were radically different methodologies. Almost forty years later – and many thousands of class actions later – the lodestar has been morphed into a surrogate for a desired percentage-of-the-recovery fee. Not only defendants but trial and appellate courts as well have acquiesced to this rejection of *Serrano III* jurisprudence.

Appellant Class Member Brennan (hereinafter "Class Member Brennan") respectfully suggests that now, nearly four decades later, this Court should focus on the ending point as well as the starting point of the fee calculation process.

The *Laffitte* case presents a critical test for this state's judiciary. Will this Court:

1. Recognize that the class action fee award process – the lodestar as well as the percentage-of-the-recovery approaches – have been reshaped since *Serrano III* to promote lawyers' financial interests at the expense of class members?

2. Institute a fee award process that ensures that attorneys' fee requests are evaluated according to *Serrano III* standards?

STATEMENT OF THE CASE

On January 10, 2004, Plaintiff Mark Laffitte filed a class action complaint in the Los Angeles Superior Court against Defendant Robert Half International, Inc., a Delaware corporation, and related companies (No. BC 321317).

The complaint alleged that class members were misclassified as exempt employees and alleged the following breaches of their rights: (i) failure to pay statutorily mandated wages; (ii) failure to provide adequate meal periods (Premium Wages); (iii) failure to provide adequate rest breaks (Premium Wages); (iv) failure to furnish timely and accurate wage statements, and (v) penalties. It alleged that the misclassifications were violations of California Labor Code, § 203; California Business & Professions Code §§ 17200, *et seq.* (Unfair Competition Law); California Labor Code §§ 2698, *et seq.* (Private Attorneys General Act of 2004); Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*; and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.*

Plaintiff Van Williamson filed a class action complaint against the same Defendants, *Williamson v. Robert Half International Inc., et al.* (BC 377930) in September 2007. In February 2011, Plaintiff Isabel Apolinario filed a class action complaint against Defendants, asserting the same claims at issue in the *Laffitte* action, but on behalf of a class of staffing professionals employed after February 23, 2007 (BC 455499). In March 2011, the court found the *Laffitte* action related to the *Apolinario* action. In September 2012, the court found the *Laffitte* case and the *Apolinario* case related to the *Williamson* action.

On January 28, 2013, in response to a Notice of Class Action Settlement (Appellant's Appendix ("AA") at 1) of the above-referenced actions, Class Member David Brennan filed his Objection (AA 7) and appeared at the March 22, 2013, and April 10, 2013, fairness hearings to present his objections before the trial court (see Argument III, pages 37-42, *infra*).

On April 10, 2013, the trial court entered an Order Granting Final Approval of Class Action Settlement and Judgment Thereon (AA 188), which granted Class Counsel $6,333,333.33 (33-1/3% of the gross settlement amount) in attorneys' fees and $127,304.08 in litigation expenses (AA 191:23, 27). Said Order and Judgment finally disposed of all issues between the parties. (California Rules of Court, Rules 8.100(a) and 8.204(a)(2)(B), and Code of Civil Procedure §§ 901 and 904.)

On June 10, 2013, Brennan filed a timely Notice of Appeal (AA 195) to the final Order and Judgment.

Appellate briefs were thereafter filed in the Court of Appeal, Second Appellate District; oral argument took place on October 2, 2014, and on October 29, 2014, the appellate court issued its subsequently published opinion, *Laffitte v. Robert Half Int'l, Inc., et al.; David Brennan, Plaintiff and Appellant*, No. B249253, 2014 Cal.App. LEXIS 1059 (2d App. Dist., Div. 7, Oct. 29, 2014) (hereinafter "*Laffitte* decision").

A Petition for Review was filed in this Court on December 23, 2014, and granted on February 25, 2015.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This class action involves a wage and hour dispute by employees of Robert Half International, Inc.

In October 2012, the court entered an Order in the related *Laffitte, Apolinario,* and *Williamson* actions, granting Plaintiffs and Defendants' joint motion for preliminary approval of the settlement and conditional certification of the settlement class defined as:

> All persons who are or were employed in California as exempt "Staffing Professionals" ... at any time from September 10, 2000 through the date of Preliminary Approval of the Settlement [October 19, 2012].

The settlement created a common fund of $19 million. The settlement agreement negotiated between Class Counsel and Defendants reads:

> Class Counsel will apply to the Court for an award of not more than $6,333,333.33 (33.33%) of the Gross Settlement Amount)....

(Respondents' Appendix ("RA"), Vol. 1, Tab 6 at 72, ¶ III.C.2.)

> The amended settlement agreement also included a "clear sailing" provision stating that class counsel would apply for their attorneys' fees "and Robert Half would not oppose their request."

Laffitte decision, *supra,* 2014 Cal.App. 1059, at *4-*5 (footnote omitted).

On January 28, 2013, in response to receipt of the Notice of Class Action Settlement (AA 1), Class Member David Brennan filed his Objection (AA 7), and a supplementary objection on April 8, 2013 (AA 174).

Fairness hearings were held on March 22 and April 10, 2013. (Rep. Tx. on Appeal (hereinafter "RT"), 3/22/13 and 4/10/13 hr'gs.)

On April 10, 2013, the trial court approved the settlement and awarded Class Counsel $6,333,333.33 (or 33.33% of the class's settlement fund). (AA 191.)

On June 10, 2013, Brennan appealed the trial court's Order Granting Final Approval of Class Action Settlement and Judgment Thereon to the Second District Court of Appeal. (AA 195.)

On October 29, 2014, the Court of Appeal for the Second Appellate District issued its unpublished opinion, overruling Brennan's objections and affirming the trial court's award of 33-1/3 percent of the class's recovery as a reasonable attorneys' fee to Class Counsel.

On November 21, 2014, after a request for publication from the Consumer Attorneys of California,[1] the Second District issued an order that modified its opinion and certified it for publication, with no change in judgment (see *Laffitte* decision, *supra*). The Second District's decision became final on November 28, 2014.

A Petition for Review was filed in the California Supreme Court on December 23, 2014. Review was granted on February 25, 2015.

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[1] A professional association of attorneys (formerly California Trial Lawyers Association), www.caoc.org.

ARGUMENT

I.

THIS COURT'S *SERRANO III* DECISION DOES NOT PERMIT CALIFORNIA TRIAL COURTS TO CALCULATE AN AWARD OF REASONABLE ATTORNEYS' FEES ANCHORED TO THE PERCENTAGE-OF-THE-RECOVERY APPROACH

A. *Serrano III* Clearly Holds That Judicial Calculations of Reasonable Attorneys' Fees Must Start with the Lodestar.

No reasonable reading of *Serrano III* would permit an attorneys' fee award in a class action to be anchored to the percentage of the common fund, and an extensive body of case law as well as public policy supports this position.

1. *Serrano III* states:

> "The starting point of every fee award, ... must be a calculation of the attorney's services in terms of the time he has expended on the case."

Serrano III, 20 Cal.3d at 49 n.23 (emphasis added), *citing City of Detroit v. Grinnell Corp.* 495 F.2d 448, 470 (2d Cir. Mar. 13, 1974).

The language of *Serrano III* clearly states "every fee award." The language is all encompassing. It creates no exception for attorneys' fees awarded from class action common funds. The *Laffitte* decision, however, implies that "every" applies to fee-shifting settlements and not common recoveries, and that *Serrano III* supports that interpretation.

> The Supreme Court in *Serrano* even recognized the viability of the "percentage of the common fund" method.

Laffitte decision, *supra*, 2014 Cal.App. LEXIS 1059, at *31 n.8.

In so arguing, *Laffitte* conflates the common fund doctrine exception to the American Rule with a so-called "percentage-of-the-common-fund method."

2. *Serrano III* states:

> "Anchoring the analysis to this concept [calculation of the attorneys' services in terms of time expended on the case] is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts."

Serrano III, supra,, 20 Cal.3d at 49 n.23, *citing City of Detroit v. Grinnell, supra,* 495 F.2d at 470 (emphasis added).

The language of *Serrano III* makes it clear that the lodestar is the only permissible starting point. The language is exclusive. It says nothing about the percentage-of-the-recovery approach anchoring a judicial award of reasonable attorneys' fees.

3. *Serrano III* states:

> Fundamental to its [the trial court's] determination – and properly so – was a careful compilation of the time spent and reasonable hourly compensation of each attorney ... involved in the presentation of the case.

Serrano III, supra, 20 Cal.3d at 48 (emphasis added; footnote omitted).

The *Serrano III* opinion states three times in three different ways its instruction on the exclusivity of the lodestar approach as the anchor for judicial awards of a reasonable attorneys'

fee. There is no language in *Serrano III* that permits an award of a reasonable attorneys' fee anchored to a percentage of the class's common fund recovery.

4. Not only does *Serrano III* make no reference to the use of the percentage-of-the-recovery approach, but the legal authorities it relies upon specifically reject the use of a percentage-of-the-recovery methodology. The decision relies upon two federal antitrust class actions, *City of Detroit v. Grinnell, supra*, and *Lindy Bros. Builders, Inc. of Phila. v. American Radiator & Standard Sanitary Corp., et al.*, 487 F.2d 161 (3d Cir. Oct. 31, 1973), that were fee awards from common funds. Both trial courts awarded reasonable attorneys' fees based upon an entitlement to an award under the common fund doctrine. In each case, the appellate court specifically rejected the trial court's use of a percentage-of-the-recovery methodology and held that a reasonable fee must be calculated using the lodestar method.

(a) [Rejection of a district court's award of 15% of a $10 million settlement fund in *Grinnell*:]

> Because we feel that this fee [the District Court's *de facto* reliance on the contingent fee approach] was excessive and displayed too much reliance upon the contingent fee syndrome ... we reverse and remand [the fee award....

City of Detroit v. Grinnell, supra, 495 F.2d at 468 (emphasis added).

(b) [Rejection of a district court's 20% of a $26 million settlement fund in *Lindy*:]

> In detailing the standards [under the equitable fund doctrine] that should guide the award of fees to attorneys successfully concluding class suits, by judgment or settlement, we must start from the purpose of the award: to compensate the attorney for the reasonable value of services benefiting the unrepresented claimant. Before the value of the attorney's services can be determined, the district court must ascertain just what were those services. To this end the first inquiry of the court should be into the hours spent by the attorneys – how many hours were spent in what manner by which attorneys.

Lindy Bros., supra, 487 F.2d at 167 (emphasis added).

The *Serrano III* court would not have relied on common fund cases that rejected the use of the percentage-of-the-recovery approach if it had intended to allow the percentage approach in common fund recoveries.

5. "[O]nce it is recognized that the court's role in equity is to provide just compensation for the attorney...."

Serrano III, supra, 20 Cal.3d at 49 n.23 (citation omitted) (emphasis added).

This statement further undermines any argument that fees awarded from a common fund were not covered by *Serrano III*. *Serrano III* explains that its holding applies whenever a court is exercising its equitable powers. Because the common fund doctrine rests squarely upon a court's equitable powers, fees awarded from common funds fall under *Serrano III*.

6. The *Laffitte* decision never addresses why *Serrano III's* rationale, justifying its lodestar requirement,

> "[A] claim [of objectivity] which is obviously vital to the prestige of the bar and the courts."
>
> (*Serrano III, supra,* 20 Cal.3d at 49 n.23 (citation omitted) (emphasis added)),

does not apply as well to attorneys' fee awards under the common fund and substantial benefits doctrines. There is no reason why these rationales:

> "[F]avorable public perception and the prestige of the legal profession and our system of justice...."
>
> (*Jutkowitz v. Bourns, Inc., et al.*, 118 Cal.App.3d 102, 111 [173 Cal.Rptr. 248] (2d App. Dist. Apr. 16, 1981) (*relying on Serrano III, supra,* 20 Cal.3d 25) (emphasis added)),

would not also apply to the common fund and the substantial benefit doctrines.

7. Under *Serrano III*, attorneys' fees are compensation for legal services provided to the client. This Court's *Serrano III* decision rests on the principle that the awarding of a reasonable attorneys' fee compensates lawyers for providing "attorneys' services" to clients:

> [T]he starting point ... must be a calculation of the attorney's services....

Serrano III, supra, 20 Cal.3d at 49 n.23 (emphasis added).

This principle is entirely distinguishable from the awarding of attorneys' fees based on a percentage of the class's monetary recovery.

B. This Court Reaffirmed *Serrano III* in *Ketchum v. Moses.*

This Court's decision in *Ketchum v. Moses*, 24 Cal.4th 1122 [104 Cal.Rptr.2d 377] (Feb. 26, 2001), supports the interpretation of *Serrano III* as requiring the lodestar as the first step and says nothing about limiting *Serrano III's* instructions to fee awards under fee-shifting statutes.

> Under *Serrano III*, a court assessing attorney fees begins with a touchstone or lodestar figure, based on the "careful compilation of the time spent and reasonable hourly compensation of each attorney involved in the presentation of the case."

Ketchum, supra, 24 Cal.4th at 1131-32, *citing Serrano III, supra,* 20 Cal.3d at 48 (emphasis added).

C. Numerous Courts of Appeal over the Years Have Interpreted *Serrano III* As Requiring the Anchoring of a Judicial Award of a Reasonable Attorneys' Fee to the Lodestar.

These cases make no mention of basing an award of reasonable attorneys' fees on the percentage-of-the-recovery approach, or limiting *Serrano III's* instructions to an award under fee-shifting statutes. Indeed, other than *Laffitte,* no reported case of which Class Member Brennan is aware holds that *Serrano III's* instructions only apply to fees sought under fee-shifting statutes.

1. *Jutkowitz v. Bourns, Inc., et al., supra,* holds that under *Serrano III,* not only must the lodestar approach be the first step in the calculation, but that percentage-based contingent fee principles cannot be part of a judicial determination of a reasonable attorneys' fee.

> Significantly, in none of the "common fund" cases, whether class actions or nonclass actions ... is there any suggestion that *the size of the fund controls the determination of what is adequate compensation.*
> ....
> In our opinion, the clear thrust of the holding in *Serrano, supra,* and the cases upon which that holding relied, is a rejection of any "contingent fee" principle in cases involving equitable compensation for lawyers in class actions or other types of representative suits.

Jutkowitz, supra, 118 Cal.App.3d at 110 (emphasis added).

2. *Salton Bay Marina, Inc., et al. v. Imperial Irrigation Dist.*, 172 Cal.App.3d 914 [218 Cal.Rptr. 839] (4th App. Dist. Sept. 30, 1985), rejects the use of a percentage-of-the-recovery approach as well:

> "While the size of the class may affect the complexity of counsel's task and the size of the fund created may reflect the quality of his work, the correct amount of compensation cannot be arrived at objectively by simply taking a percentage of that fund."

Id. at 954, *citing Jutkowitz, supra,* 118 Cal.App.3d at 111 (emphasis added). *Accord, The People ex rel. Department of Transportation v. Yuki, et al.*, 31 Cal.App.4th 1754, 1769 [37 Cal.Rptr.2d 616] (6th App. Dist. Jan. 6, 1995).

> On remand, the court should begin its analysis with a calculation of the attorney services in terms

> of time the attorneys actually expended on the case. (*Serrano v. Priest* [*Serrano III*] ... *20 Cal.3d 25, 48, fn. 23.*),

Salton Bay, supra, 172 Cal.App.3d at 957-58.

3. *Dunk v. Ford Motor Co., et al.*, 48 Cal.App.4th 1794 (4th App. Dist., Div. 3, Aug. 30, 1996), supports Class Member Brennan's contention that *Serrano III* rejected the anchoring of the judicial award of reasonable attorneys' fees to the percentage-of-the-recovery approach.

> The award of attorney fees based on a percentage of a "common fund" recovery is of questionable validity in California....
> ....
> Later cases have cast doubt on the use of the percentage method to determine attorney fees in California class actions.

Dunk, supra, 48 Cal.App.4th at 1809 (citations omitted) (emphasis added).

The *Dunk* decision also specifically ruled that the percentage-of-the-recovery approach was not available in common fund cases.

> [Class Counsel claim that] $1 million attorney fees ... were only a tiny percentage of the potential settlement value of over $26 million. This argument suffers from two flaws: (1) The award of attorney fees based on a percentage of a "common fund" recovery is of questionable validity in California....

Ibid. at 1809 (emphasis added).

4. *Lealao, supra,* supports Class Member Brennan's contention that *Serrano III* held that the lodestar must be the anchoring analysis of a reasonable fee in common fund cases.

> The primacy of the lodestar method in California was established in 1977 in *Serrano III, supra*, 20 Cal. 3d 25. Adopting the view at that time of the Second and Third Circuits, our Supreme Court declared: "'The starting point of every fee award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be a calculation of the attorney's services in terms of the time he has expended on the case.'"
> ....
> The reason the fee analysis must be "anchored" to the time spent on the case and a reasonable hourly rate, the [*Serrano III*] court declared, is that "'this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the courts.'" [*Serrano III*, 20 Cal.3d at 48 n.23.] This statement, which arguably renders it questionable whether a pure percentage fee can be awarded even in a conventional common fund case (see *Dunk v. Ford Motor Co.* ... 48 Cal.App.4th at p. 1809)....

Lealao, supra, 82 Cal.App.4th at 26 (citations omitted; emphasis added), and at 39 (emphasis added).

There is no support in *Lealao* for the holding in *Laffitte* that *Serrano III* does not apply to attorneys' fees awarded from common funds. The attorneys in *Lealao* had sought a fee award under all three exceptions to the American Rule.

> The plaintiffs' counsel moved for reasonable attorney fees, resting not on statute but on the inherent equitable powers of the court. In support

> of their claim they relied on three theories: the common fund, substantial benefit, and private attorney general exceptions to the general rule disfavoring fees.
>
> (*Lealao, supra,* 82 Cal.App.4th at 38 (footnote omitted; emphasis added).)

Nowhere does *Lealao* suggest that *Serrano III* only applies in fee-shifting circumstances.

D. The *Laffitte* Decision Contradicts the Common Fund Doctrine.

The awarding of reasonable attorneys' fees under the common fund doctrine is an exception to the American Rule.

> The common fund cases ... are exceptions to the general rule applicable in this country that each party to the litigation must bear the expense of its own attorney fees.
>
> (*City and County of San Francisco v. Sweet*, 12 Cal.4th 105, 115 [48 Cal.Rptr.2d 42] (Dec. 18, 1995) (emphasis added).)

The doctrine is based on the concept of *quantum meruit.*

> An award of fees under the equitable common fund doctrine is "'analogous to an action in quantum meruit: The individual seeking compensation has, by his actions, benefited another and seeks payment for the value of the service performed.'"

Consumer Cause, Inc. v. Mrs. Gooch's Natural Food Market, Inc., 127 Cal.App.4th 387, 397 [25 Cal.Rptr.3d 514] (2d App. Dist. Mar. 7, 2005), *citing Serrano v. Unruh,* 32 Cal.3d 621, 628 [186 Cal.Rptr. 754] (Oct. 28, 1982) (emphasis added).

An attorneys' fee award based on a percentage of the amount of the settlement would violate the very principle – *quantum meruit* – upon which the common fund doctrine was established.

E. The *Laffitte* Decision Contradicts Class Action Attorneys' Fee Jurisprudence.

To allow attorneys' fee awards to be based on a percentage of the class settlement fund is inconsistent with California class action attorneys' fee jurisprudence:

> Nonetheless, the plaintiffs' attorneys owe an ethical and fiduciary duty to their clients ... to limit fees to an amount that represents the value of the work done.

Robbins v. Alibrandi, 127 Cal.App.4th 438, 444 [25 Cal.Rptr.3d 387] (1st App. Dist., Div. 1, Feb. 4, 2005) (emphasis added).

II.

ANCHORING THE FEE AWARD TO THE LODESTAR APPROACH IS NO LONGER THE CENTRAL ISSUE IN JUDICIAL AWARDS OF REASONABLE ATTORNEYS' FEES FROM CLASS ACTION COMMON FUNDS

A. The Litigation Landscape Has Changed Since *Serrano III.*

In 1977, the *Serrano III* court was presented with two public interest plaintiffs' law firms, who were each awarded $400,000 in attorneys' fees by the trial court. They were subsequently awarded $74,254 in connection with their services in defending the judgment on the appeal of *Serrano v. Priest, et al.* (*Serrano II*), 18 Cal.3d 728 [135 Cal.Rptr. 345] (Dec. 30, 1976), and $39,560 in connection with

defending the fee award on appeal in *Serrano III*, *supra,* 20 Cal.3d 25 (Oct. 4, 1977).[2]

Attorneys' fees sought nowadays by plaintiffs' class action lawyers are vastly different in scale.[3]

B. The Significance of the Choice of the Lodestar Approach Has Been Neutralized in the Context of the Modern Class Action.

The distinction between the lodestar approach and the percentage-of-the-recovery approach as the starting point of a fee calculation was meaningful in 1977. In the intervening years since *Serrano III*, the approach at the start of fee setting is less important than the methodology one ends with. Whether used as a starting point or as a cross-check,[4] the lodestar analysis can be manipulated to produce a predetermined dollar amount that would have resulted from use of the percentage-of-recovery method. Thusly, a fee award can appear to be based on the lodestar approach, when it actually represents a backdoor method for awarding a *de facto* percentage fee.

Indeed, the warning of the *Yuki* court on this point has been disregarded:

> [I]t is improper for the trial court to start with the amount of the contingency fee and then work backwards,

---

[2] *See Serrano v. Unruh,* 32 Cal.3d 621, 625 [186 Cal.Rptr. 754] (Oct. 28, 1982).

[3] The *Laffitte* litigation spanned eight and one-half years. (*Laffitte* decision, *supra,* 2014 Cal.App. LEXIS 1059, at *11.) *Serrano III* covered a period of almost ten years, 1968 through 1977.

[4] As far as Class Member Brennan is aware, this Court has never accepted the concept of the lodestar as a cross-check.

> applying the various other factors in order to justify that amount.

The People ex rel. Dep't of Transp. v. Yuki, supra,, 31 Cal.App.4th at 1771.

C. Confirming the Lodestar Approach As the Starting Point Is Insufficient to Ensure Enforcement of *Serrano III's* Requirements.

Sending this case back to the the trial court with the instruction to commence the fee award process with a lodestar calculation will not accomplish *Serrano III's* goals of (i) assuring the fee award is based on the work reasonably performed by class counsel; (ii) protecting the class's recovery against excessive attorneys' fee claims, and (iii) preserving the respect of the bench and the integrity of the bar.

The *Laffitte* decision is merely one example, albeit a good example, of how the lodestar instructions in *Serrano III* and *Ketchum* have been ignored. (See Argument III, pages 37-42, *infra.*)

1. Confirming the lodestar approach as the starting point will not address the *Lealao* decision.

Lealao, supra, held that *Serrano III* permits consideration of contingent fee percentage principles borrowed from traditional individual client tort litigation, while still using the lodestar as the starting point. It did so by holding that contingency fee percentages could be considered as part of the multiplier/enhancement phase of a lodestar analysis.

> [A] trial court has discretion to adjust the basic lodestar through the application of a positive or

> negative multiplier where necessary to ensure that the fee awarded is within the range of fees freely negotiated [as a percentage of the recovery] in the legal marketplace in comparable litigation.

Lealao, supra, 82 Cal.App.4th at 49-50 (bracket added).

Lealao's introduction of contingent fee percentage principles countermands *Serrano III's* rejection of the percentage-of-the-recovery method. Importing contingent fee principles from traditional single client, single lawyer/law firm tort litigation into the multiplier phase of a lodestar analysis effectively eliminates the primacy of the lodestar method.

For this Court to reaffirm *Serrano III's* primacy of the lodestar but permit *Lealao's* percentage-of-the-recovery enhancement of the lodestar would nullify the significance of the lodestar as a starting point. *Lealao* allows a completed lodestar analysis to become the functional equivalent of a percentage-of-the-recovery fee. *Lealao* has rewritten *Serrano III's* rejection of percentages on the ground that:

> As we have said, the California Supreme Court has never prohibited adjustment of the lodestar on this basis.

Lealao, supra, Cal.App.4th at 49 (emphasis added).

2. Apart from the *Lealao* holding, judicial calculations of the lodestar as reflected in *Laffitte* exemplify the rejection of this Court's *Serrano III* and *Ketchum* instructions.

The lodestar calculation is no longer an effort to determine whether all hours claimed were necessary; whether hours

have been padded; or whether specific legal services have been performed at a reasonable rates.

(a) Class actions have placed unique pressure on the judiciary to find ways to circumvent *Serrano III/Ketchum*-compliant lodestar calculations.

The class action experiment of delegating to the trial court judge the dual roles of fiduciary protector of the class's recovery and neutral fact finder has not worked in the real world. It places impossible demands on the trial court judge to simultaneously assume the conflicting roles of impartial judge and class advocate. Although this problem was recognized early in the development of the class action experiment, it has been ignored.

> The dilemma thereby created for the Court finds the judge playing "devil's advocate" on behalf of the disinterested defendants, while at the same time attempting to exercise his impartiality in making a just determination of reasonable fees. To require the judge to occupy an adversary position during the fee proceedings is highly inconsistent with his acknowledged duty to act as an impartial arbitrator.

Haas v. Pittsburgh National Bank, et al., 77 F.R.D. 382, 383 (W.D. Pa. Dec. 7, 1977) (emphasis added).

(b) Overworked judges and understaffed trial courts exacerbate the problem.

The increasing demands on the judiciary in an increasingly litigious society have made *Serrano III/Ketchum*-compliant lodestar calculations unworkable for busy trial court judges.

The lodestar approach is a time-intensive procedure and trial court time is a limited commodity.

> It adds to the work load of already overworked district courts.
>
> (*Lealao, supra,* 82 Cal.App.4th at at 31; emphasis added.)

The integrity of the fee award process has given way to clearing the court's docket.

> No matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket. They cannot reliably police the day-to-day interests of absent class members.

Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 829 (Spring 1997) (emphasis added).

(i) Trial court judges are not equipped to handle the review of millions of dollars of legal bills from multiple law firms and lawyers claiming thousands (indeed tens of thousands) of hours of legal services rendered. The way it works now, the larger the fee, practically speaking, the less likely it is that the fee request will be scrutinized by the court.

> Yet the typical judicial inquiry into these matters is superficial at best.

Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 Univ. Chic. L. Rev. 1, 52 (No. 1, Winter 1991).

(ii) Lodestar scrutiny of the highest quality can be done without imposing a burden on busy courts. (See pages 48 through 49, *infra*.)

(c) The theory of the representative class plaintiff as protector of the class's interest:

> A better safeguard for protecting the interests of the putative class is the *ongoing* supervision of an independent class representative.
> ....
> "In this way the representative can watch out for the interests of the class should the attorney be blinded by more selfish motives."
>
> (*Apple Computer, Inc. v. The Superior Court of Los Angeles*, 126 Cal.App.4th 1253, 1268, 1272-73 (citation omitted) [24 Cal.Rptr. 3d 818] (2d App. Dist., Div. 1, Feb. 17, 2005)),

has not succeeded in practice.

The representative plaintiffs' role is merely the person in whose name the class action complaint is filed. Indeed, oftentimes it is the lawyer who seeks out a client rather than the other way around. The representative plaintiff, although formally retaining the law firm, has no incentive to monitor legal services since the class will pay the bill.

As one court has noted, the representative plaintiff is, in reality, a "cat's paw" for the plaintiffs' lawyers.

> [The special master] placed <u>little weight</u> on the contingent fee agreements between the lawyers

> and the "clients" (the named plaintiffs in the class actions), recognizing that named plaintiffs are usually cat's paws of the class lawyers.

In re Trans Union Corp. Privacy Litig., 629 F.3d 741, 744 (7th Cir. Jan. 14, 2011) (emphasis added).

D. Avoiding the Requirements of *Serrano III* and *Ketchum* Has Resulted in a Set of Holdings Antithetical to *Serrano III/Ketchum's* Judicial Responsibilities.

1. The no "second major litigation" rationale.

Despite the fact that millions, tens of millions, and even hundreds of millions of dollars in attorneys' fees are being sought by plaintiffs' class lawyers, the class action system has seized upon a remark from the 1983 concurrence of United States Supreme Court Justice William J. Brennan Jr. in *Hensley v. Eckerhart*, 461 U.S. 424 (May 16, 1983), that disputes over attorneys' fee issues are not worthy of significant judicial attention:

> [T]he admonition of the Supreme Court in *Hensley v. Eckerhart, supra, 461 U.S. 424, 437 [103 S. Ct. 1933, 1941]* that a request for attorney fees should not result in a "second major litigation."

Lealao, supra, 82 Cal.App.4th at 31 n.5.

Litigation over fees, in spite of the fact that it involves protection of the class's recovery from attorneys' overreaching, has been characterized as a "waste of judicial resources." *Goldberger v. Integrated Resources,* 209 F.3d 43, 49-50 (2d Cir. Mar. 28, 2000). A class action, for example, against a title company for "overcharging" customers would be major litigation, with the plaintiff class entitled to

every available litigation tool, i.e., motions, experts, and discovery. Class members have none of these normal legal protections when the allegation is that it is the class's counsel who are doing the overcharging.

2. The "no time records necessary" rationale:

> "It is well established that 'California courts do not require detailed time records, and trial courts have discretion to award fees based on ... the court's own view of the number of hours reasonably spent....'"

Laffitte decision, *supra,* 2014 Cal.App. LEXIS 1059, at *34 (citation omitted).

(a) Supporting documentation in the form of time records has been held to be no longer necessary for a court to fulfill its *Serrano III* and *Ketchum* responsibilities.

Indeed, in *Laffitte*, the court found 4,263.5 hours reasonable without supporting documentation other than a claim by Class Counsel regarding the individual hours of each attorney (see page 37, *infra*). This, in spite of this Court's instructions requiring:

> [A] careful compilation of the time spent and reasonable hourly compensation....

Serrano III, supra, 20 Cal.3d at 48 (emphasis added; footnote omitted).

> [That the court] must carefully review attorney documentation of hours expended.

Ketchum. supra, 24 Cal.4th at 1132.

> [That] "padding" in the form of inefficient or duplicative efforts is not subject to

> compensation. (See [*Serrano III,* 20 Cal.3d] at p. 48.)

Ketchum, supra, 24 Cal.4th at 1132.

One cannot carefully compile a lodestar, carefully review documentary support, and eliminate padded time without detailed information about which timekeepers performed what legal services, when, and for how long.

(b) This "no time records necessary" rationale has been adopted, in spite of the fact that:

> The working of excessive hours and inflation of time sheets [are] reported to be common abuses in class action litigation.

Macey & Miller, *The Plaintiffs' Attorneys' Role in Class Action and Derivative Litigation, etc., supra,* at 56 n.146. (And that was 35 years ago – one can only imagine a much larger problem today.)

(c) The "no time records necessary" rationale has been accomplished through a misapplication of case law to nullify *Serrano III* and *Ketchum* requirements.

The *Laffitte* court relied on *Syers Properties III, Inc. v. Rankin*, 226 Cal.App.4th 691, 698 [172 Cal.Rptr.3d 456] (1st App. Dist., Div. 2, May 5, 2014), and *Chavez v. Netflix*, 162 Cal.App.4th 43 [75 Cal.Rptr.3d 413] (1st App. Dist., Div. 1, Apr. 21, 2008) (see *Laffitte* decision, *supra*, 2014 Cal.App. LEXIS 1059, at *34).

> [A] court may award fees based on time estimates <u>for attorneys who do not keep time records</u>.

Syers Properties, supra, 226 Cal.App.4th at 699 n.4 (emphasis added), *relying in Chavez v. Netflix, supra,* 162 Cal.App.4th at 64.

This no-time-records-necessary rule was (mis)applied by the *Laffitte* court because the attorneys claimed to have kept meticulous time records down to the tenth of an hour.

> [T]he Antonelli law firm reported its time down to the .7 of an hour (723.7 hrs.); Attorney Barnes reported his time down to the .5 of an hour (2,259.5 hrs.), and Gregg Lander (Barnes's partner) reported his time down to the .3 of an hour (807.3 hrs.).

(Appellant's Opening Brief ("AOB") at 25.)

(i) The "no time records necessary" rationale initially permitted trial courts to award reasonable attorneys' fees where the attorneys kept no time records (i.e., contingent personal injury litigation).

Chavez v. Netflix, Inc., 162 Cal.App.4th 43 [75 Cal.Rptr.3d 413] (1st App. Dist., Div. One, Apr. 21, 2008):

> The court may award fees based on time estimates for attorneys <u>who do not keep time records</u>. (*Margolin v. Regional Planning Com.* (1982) 134 Cal.App.3d 999, 1006-1007 [185 Cal.Rptr. 145].)

Chavez, supra, at 64 (emphasis added).

(ii) The no time records necessary rule – for attorneys who do not keep time records – has morphed into a time records are not necessary, even where time records are relied upon by class counsel.

> California case law permits fee awards in the absence of detailed time sheets. (*Sommers v. Erb (1992) 2 Cal. App. 4th 1644, 1651 [4 Cal. Rptr. 2d 52]*; *Dunk, supra, 48 Cal.App.4th at 1810; Nightengale v. Hyundai Motor America (1994) 31 Cal.App.4th 99, 103 [37 Cal.Rptr.2d 149].*)

Wershba v. Apple Computer, Inc., 91 Cal.App.4th 224, 255 [110 Cal.Rptr.2d 145] (6th App. Dist. July 31, 2001).

(iii) The "no time records necessary" rule has been extended beyond its original context to multimillion-dollar fees in spite of the fact that the cases relied upon involve much more modest sums of money ($38,333, the amount of the fee award in *Sommers v. Erb*[5]); ($7,255.95, the amount of the fee award in *Dover Mobile Estates v. Fiber Form Products, Inc.*[6]); ($6,840, the amount of the fee award in *G.R. v. Intelligator*[7]); ($113,853, the amount of the fee award in *Nightingale v. Hyundai Motor America*[8]).

In *Laffitte*, Class Counsel were not seeking $6,840, but $6,333,333.33 in fees and kept time records to the tenth of an hour.

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[5] 2 Cal.App.4th 1644, 1651 [4 Cal.Rptr.2d 52] (4th App. Dist., Div. 1, Jan. 29, 1992).

[6] 220 Cal.App.3d 1494, 1501 [270 Cal.Rptr. 183] (6th App. Dist. May 31, 1990).

[7] 185 Cal.App.4th 606, 621 [110 Cal.Rptr.3d 559] (4th App. Dist., Div. 3, June 10, 2010).

[8] 31 Cal.App.4th 99, 1031 [37 Cal.Rptr.2d 149] (1st App. Dist., Div. 3, Dec. 27, 1994).

3. *Serrano III's* recognition of appeals of court-awarded attorneys' fees has been nullified.

> The [trial court's] ..."judgment [in awarding attorneys' fees] is of course subject to review...."

Serrano III, supra, 20 Cal. 3d at 49 (citation omitted).

Lastly, but by no means least, the "no time records necessary" holding makes appeal of the reasonableness of the number of hours claimed by Class Counsel impossible.

Appellate rules prohibit appeals of fee awards on a claim of excessive or unnecessary time spent by the attorneys unless specific references to specific instances of excess are identified.

> In challenging attorney fees as excessive because too many hours of work are claimed, it is the burden of the challenging party to point to the specific items challenged, with a sufficient argument and citations to the evidence. General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice.
> ....
> (*See Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1248 [132 Cal.Rptr.2d 57] [argument that billing is duplicative and unreasonable, unsupported by citation to record or explanation of which fees were challenged gives no basis to disturb trial court's discretionary fee ruling];....)

Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assoc., 163 Cal.App.4th 550, 564 and 562 [77 Cal.Rptr.3d 695] (2d App. Dist., Div. 4, May 30, 2008).

The court's failure to require time records denies class members their basic due process right to appeal the court's approval of the reasonableness of the time spent.

4. The "declarations in lieu of time records are permissible" rationale.

> "We see no reason why [the trial court] could not accept the declarations of counsel attesting to the hours worked...."

Laffitte, supra, 2014 Cal.App. LEXIS 1059, at *35 (brackets in original), *citing Sutter Health Uninsured Pricing Cases,* 171 Cal.App.4th 495, 512 [89 Cal.Rptr.3d 615] (3d App. Dist. Jan. 27, 2009).

(a) Appellate court decisions in class actions have permitted trial courts to award multimillion-dollar attorneys' fees without the submission of time records on the justification that the claimed number of hours were submitted by the attorneys "under penalty of perjury,"[9] or as "officers of the court."[10]

(i) Allowing declarations in the place of time records assumes a level of trust that this Court specifically held must not be accorded to attorneys seeking fees. Rather than merely relying on the declaration of an attorney who seeks a court-awarded reasonable attorney's fee, this Court required careful scrutiny of supporting documentation. The padding of time is misconduct,

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[9] *Weber v. Langholz*, 39 Cal.App.4th 1578, 1587 [46 Cal.Rptr.2d 677] (2d App. Dist., Div. 4, Nov. 13, 1995) ("made under penalty of perjury")

[10] *Horsford v. The Board of Trustees of California State Univ., et al.,* 132 Cal.App.4th 359, 396 (5th App. Dist. Aug. 31, 2005) ("as officers of the court").

unethical, and even illegal in some instances. One cannot expect a declaration by an attorney to disclose instances of padded time. If attorneys' declarations were sufficient, then *Serrano III's* and *Ketchum's* instructions would never have been required.

(ii) The trial and appellate court decisions that permit trial courts to award reasonable attorneys' fees based solely on attorneys' declarations have been misapplied because those declarations include specific time references to specific tasks or small amounts of time ("30.4 hours in ... defeating the fourth and sixth causes of action" and "9.3 hours working on the motion for attorney's fees...."[11]) ("three hours' worth of time to attend and participate in the hearing"[12]) ("the number of hours was between 90 and 103"[13]).

The attorneys' fee declarations in *Laffitte* only provided the total time of each attorney. (See page 37, *infra.*)

5. The (mis)application of federal law[14] by California trial and appellate courts to California class action attorneys' fee jurisprudence is a clear rejection of *Serrano III* and *Ketchum.*

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[11] *City of Colton v. Singletary*, 206 Cal.App.4th 751, 785 [142 Cal.Rptr.3d 74] (4th App. Dist., Div. 2, May 30, 2012).

[12] *G.R. v. Intelligator*, *supra,* 185 Cal.App.4th at 621 (emphasis added).

[13] *Weber v. Langholz*, *supra,* 39 Cal.App.4th at 1587.

[14] Federal law regarding the primacy of the lodestar analysis has changed since California relied on federal practice in the late 1970s. In the federal system, most, if not all circuits, permit courts to choose either the lodestar or percentage approaches.

Ignoring *Serrano III* and Ketchum requirements, California trial and appellate courts cite to federal practice rather than California precedent.

(a) From the *Laffitte* decision:

> In *Chavez v. Netflix, Inc., supra*, 162 Cal.App.4th 43 the court held that attorneys' fees of 27.9% of the class benefit awarded was "not out of line with class action fee awards calculated using the percentage-of-the-benefit method....

Laffitte, supra, 2014 Cal.App. LEXIS at 1059, at *32.

(i) *Chavez* is in fact based on federal fee jurisprudence that directly contradicts *Serrano III's* rejection of the use of percentages to calculate a reasonable attorneys' fee.

> "Empirical studies show that, regardless whether the percentage method or the lodestar method is used, fee awards in class actions average around one-third of the recovery." (*Shaw v. Toshiba America Information Systems, Inc. (E.D. Tex. 2000) 91 F. Supp. 2d 942, 972.*)

Chavez, supra, 162 Cal.App.4th at 66 n.11 (italics in original; underline added).

(ii) *Laffitte* again relies on federal fee jurisprudence regarding percentages, citing:

> (*Fischel v. Equitable Life Assur. Society of U.S. (9th Cir. 2002) 307 F.3d 997, 1006* [recognizing "a 25 percent 'benchmark' in percentage-of-the-fund cases..."].)

Laffitte, supra, 2014 Cal.App. LEXIS at 1059, at *32-*33.

(b) Other examples of reliance on federal law:

Wershba v. Apple Computer ignores *Serrano III,* and instead cites to federal law.

> Courts recognize two methods for calculating attorney fees in civil class actions: the lodestar/multiplier method and the percentage of recovery method. (*Zucker v. Occidental Petroleum Corp. (C.D.Cal. 1997) 968 F. Supp. 1396, 1400.*)

Wershba v. Apple Computer, Inc., 91 Cal.App.4th 224, 254 [110 Cal.Rptr.2d 145] (6th App. Dist. July 31, 2001).

6. The misapplication of traditional single-plaintiff, single-lawyer/law firm contingency fee model.

(a) California courts have not merely adopted federal fee jurisprudence on the use of percentages, but have adopted a totally inapposite market to guide percentage fee awards in class actions. They have accepted the individual plaintiff's, single lawyer/law firm's contingent percentage fee model from tort litigation and (mis)applied it to class action common fund fee awards.

From *Laffitte*:

> [C]ontrary to Brennan's assertion, the trial court's use of a percentage of 33 1/3 percent of the common fund is consistent with, and in the range of, awards in other class action lawsuits.

Laffitte, supra, 2014 Cal.App. LEXIS at 1059, at *32.

However, as noted by Retired U.S. District Court Judge Vaughn R. Walker and Ben Horwich,

> It might be that our notions of a "fair" percentage have been imported uncritically from the one-plaintiff contingent fee context into the class action world, where economics of scale reign.
>
> ....
>
> By contrast, a percentage fee represents an arbitrary percentage apparently drawn from personal injury practice on behalf of individuals rather than a class, adjusted by factors idiosyncratic to the particular case.

Walker, Vaughn R. & Ben Horwich, *The Ethical Imperative of a Lodestar Cross-Check: Judicial Misgivings about "Reasonable Percentage" Fees in Common Fund Cases*, 18 GEO. J. OF LEGAL ETHICS 1453, 1469 (No. 4, Fall 2005).

(i) Economies of scale referred to in *Lealao* have been largely ignored.

> "In a contingent fee case involving a small number of plaintiffs, a percentage of the recovery, even a fairly large percentage such as 331/3 percent, will frequently yield a result that is fair to both the attorney and the client in light of the value provided to the client by the attorney. But where the size of the settlement is due to the fact that it resolves not just one claim, but large numbers of identical claims, and the services of the attorney are essentially the same as would have been required if there had been only one claim, it makes no sense to gear the fee award to the total dollar amount of the settlement....."

Lealao, supra, 82 Cal.App.4th at 49 n.16, *citing* John F. Grady, *Reasonable Fees: A Suggested Value-Based Analysis for Judges,* 184 F.R.D. 131, 141-142 (1998) (footnote omitted) (emphasis added).

The class action mechanism provides the financial incentives necessary to encourage attorneys to pursue class litigation. The aggregation of large numbers of claims into a class action produces very large potential liability, creating a sufficient fee and a strong pressure on defendants to settle.

(ii) Not surprisingly, the individual contingent fee percentage model as used in the class action context overpays attorneys.

> [T]he percentage method is also subject to serious deficiencies. First, as we have already demonstrated, the percentage method results in systematic excess profits for plaintiffs' attorneys – returns beyond what the attorney would earn in an efficiently functioning market.

Macey & Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation, etc., supra,* at 59 (emphasis added).

> *Fixed percentages will drastically overcompensate lawyers in some cases and drastically undercompensate them in others.* Twenty-five or thirty percent might be an appropriate award on a recovery of a million dollars.
> ....
> It is likely, on the other hand, to result in a windfall in a case where the recovery totals many millions of dollars.

In re Superior Beverage/Glass Container Consol. Pretrial, 133 F.R.D. 119, 124 (N.D. Ill., Eastern Div., Nov. 5, 1990) (emphasis added).

Confirming that percentages have a tendency to overpay lawyers, Richard Pearl (coincidently the expert that submitted a declaration in support of Class Counsel's fee petition in *Laffitte*) has observed:

> Common fund fees, however, can sometimes be calculated using a percentage-of-the-fund method, which can result in fees that the courts might be reluctant to grant under the lodestar-adjustment method.

Richard M. Pearl, CALIFORNIA ATTORNEY FEE AWARDS, 3d ed. (CEB Mar. 2014 Update), at § 5.18, pp. 5-11 (emphasis added).

(b) When the common fund doctrine was first implemented in 1885 in *Central Railroad v. Pettus*, the percentages referred to were 5 to 10 percent.

> The decree gave them an amount equal to ten per cent, upon the aggregate principal and interest of the bonds and coupons filed in the cause....
> ....
> It is shown that appellees had with the complainants contracts for small retainers and five per cent, upon the sums realized by the suit.

Central Railroad & Banking Co. of Georgia v. Pettus & Others, 113 U.S. 116, 128 (Jan. 5, 1885) (emphasis added).

III.

THE *LAFFITTE* DECISION EXEMPLIFIES HOW COURTS DISREGARD THE *SERRANO III* AND *KETCHUM* REQUIREMENTS

The *Laffitte* fee award did not determine whether all hours claimed were necessary; whether hours had been padded; or whether legal services had been performed at reasonable rates.

A. No Careful Compilation of Time.

The lodestar total time of 4,263.5 hours was found reasonable based on the total hours claimed by the individual attorney. (AOB at 23.)

Kevin Barnes reported 2,259.5 hrs. (at $750/hr.), and his partner, Gregg Lander, reported 807.3 hrs. (at $600/hr.) (App. 33:12-13). Jeanelle Carney, Joseph Antonelli's partner, reported 14.40 hours (at $600/hr.), and Joseph Antonelli reported 709.3 hrs. (at $750/hr.).[15] Mika Hilaire reported 423 hrs. (at $500/hr.).[16]

> Objection: It is not permissible under California attorneys' fee jurisprudence to take the total number of hours claimed by a law firm and ignore the amount of time spent on specific services performed by the individual attorneys.

(AOB at 23.)

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[15] Decl. J. Antonelli in Support of Plfs' Mot. for Final Approval of Class Settlement, filed 2/28/13, at 9:16-18.

[16] Decl. M. Hilaire in Support of Final Approval of Class Action Settlement and Award for Attorneys' Fees, Costs, and Class Representative Enhancements, filed 2/28/13, at 3:6-7.

Laffitte answer:

> The trial court did not abuse its discretion by relying on the hours work and hourly rates provided by each of the class attorneys, and the description of the work the attorneys performed in calculating the lodestar cross-check on the award.

Laffitte decision, *supra,* 2014 Cal. App. LEXIS 1059, at *34-*35.

B. No Time Records Were Filed.

Objection: Although each attorney recorded their time down to the tenth of an hour (see page 27, *supra*), time records supporting their claimed time were not filed.

Laffitte answer:

> "It is well established that "California courts do not require detailed time records, and trial courts have discretion to award fees based on declarations of counsel describing the work they have done and the court's own view of the number of hours reasonably spent...."

Laffitte decision, *supra*, 2014 Cal. App. LEXIS 1059, at *34, *citing Syers Properties, supra,* 226 Cal.App.4th at 698 (internal citations omitted).

Ironically, but perhaps not surprisingly, the basis for the *Laffitte* court's holding was strikingly similar to the district court's findings in *Lindy Bros., supra,* and *Grinnell, supra,* that was criticized by the appellate court decisions upon which *Serrano III* was based.

> [T]he only information furnished to the district judge regarding the time spent by Kohn, Berger and their associates was that they had spent "in excess of 6,000 hours in connection with this litigation." 341 F.Supp. at

1090. This information was insufficient to support the award of fees to Kohn and Berger.

Lindy Bros., supra, 487 F.2d at 167.

C. Inadequate Declarations.

Objection: Class Counsel's declarations are unhelpful and self-serving. A sample:

> "The settlement that has been reached is the product of tremendous effort, and a great deal of expense by the parties and their counsel. The parties' assessment of the matter is based on one of the most heavily litigated cases I have ever been a part of and the extensive research and litigation for the past 8 ½ years. This litigation included extensive written discovery, extensive law and motion practice, 68 depositions, three Motions for Summary Judgment, a Class Certification Motion, subsequent Reconsideration Motion and then another Motion to Decertify, numerous experts, consultation with an economist regarding potential damage exposure and two full day mediations."

Laffitte decision, *supra,* at 2014 Cal.App. LEXIS 1059, at *8 (*citing* Decl. of Kevin Barnes, AA 30:4-11).

Laffitte answer:

> "We see no reason why [the trial court] could not accept the declarations of counsel attesting to the hours worked, particularly as [the court] was in the best position to verify those claims by reference to the various proceedings in the case."

Laffitte decision, *supra,* 2014 Cal. App. LEXIS 1059, at *35 (brackets in original), *citing Sutter Health Uninsured Pricing Cases*, *supra,* 171 Cal.App.4th at 512.

Again, not surprisingly, this kind of non-specific description that was criticized in *Lindy Bros.*, which *Serrano III* relied on when rejecting the percentage approach.

> [B]ut without some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e.g., senior partners, junior partners, associates, the court cannot know the nature of the services for which compensation is sought.

Lindy Bros., supra, 487 F.2d at 167.

Generalized descriptions of the work are useless for the purpose of detecting padding. Such declarations cannot be used to disclose inefficient staffing, excessive consultation, and any other of the myriad attorney padding techniques. The court's finding avoids its judicial responsibility to assure itself that, for example, "extensive" written discovery or "extensive" law and motion practice did not reflect padding or duplication of effort. Terms such as "extensive" and "numerous" do not connote specific periods of time.

D. Improper Delegation.

Objection: No legal services were charged to the class at less than $500 an hour (see *Laffitte* decision, 2014 Cal.App. LEXIS 1059, at *7-*8), and with the multiplier, at hourly rates of $1,065 to $1,597.50. The following examples strongly suggest a failure to delegate properly:

- Legal research by partner-level attorney at $600 per hour.
- Brief writing by partner-level attorney at $600 per hour.

- Partner-level involvement at $750 per hour in "all aspects of this case" and [partners] "actively involved in every step of this litigation." (AA 170:18-19).

E. Overstaffing.

Objection: This case did not require staffing by five attorneys highly experienced in the field of wage and hour class actions.

- A third highly experienced attorney, charging $500 per hour, was "actively involved" in the case after she had referred it to two attorneys with an even higher level of experience, and who charged the class $750 an hour.

Trial court's response:

> Class Counsel billed $2,968,620 on this amount of time, based on hourly rates of $750/hour for Barnes and Antonelli, $600/hour for Lander and Carney, and $500/hour for Hilaire.... This rate is justified by the high level of Class Counsel's experience in litigating wage and hour claims/class actions.

(AA 149; AOB 27-28.)

F. Improper Multiplier.

Objection: Traditional factors used to justify a multiplier of 2.13 were inadequate as a matter of law. (AOB at 43, 44, 47.) Class Counsel asked for a multiplier of between 2.03 and 2.13, and the trial judge awarded 2.13 for a requested fee of 33-1/3 percent of the class's recovery – $6,333,333.33.

Laffitte answer:

> "'In reviewing a challenged award of attorney fees and costs, we presume that the trial court considered all appropriate factors in selecting a multiplier and applying it to the lodestar figure.'"

Laffitte decision, *supra*, 2014 Cal.App. LEXIS 1059, at *37, *citing Taylor v. Nabors Drilling USA, LP,* 222 Cal.App.4th 1228, 1249 [166 Cal.Rptr.3d 676] (2d App. Dist., Div. 6, Jan. 13, 2014) (internal citation omitted).

G. No Finding of the Reasonableness of Effective Hourly Rate.

Objection: The court in *Laffitte* made no finding about the reasonableness of awarding a fee of approximately $1,485.65 an hour for each hour claimed.

Laffitte answer:

> [S]ee also *In re Bluetooth Headset Products Liability Litigation (9th Cir. 2011) 654 F.3d 935, 944, 945* (*Bluetooth*) ["we have also encouraged courts to guard against an unreasonable result by cross-checking their calculations against a second method," and "the lodestar method can 'confirm that a percentage of recovery amount does not award counsel an exorbitant hourly rate'"]....

Laffitte decision, *supra,* 2014 Cal. App. LEXIS 1059, at *33-*34.

IV.

THE JUDICIAL SYSTEM MUST ADAPT TO PRESENT DAY REALITIES TO FULFILL *SERRANO III'S* INTENT OF AVOIDING EXCESSIVE ATTORNEYS' FEES IN CLASS ACTIONS AND MAINTAINING THE INTEGRITY OF THE BAR AND THE PUBLIC'S RESPECT FOR THE JUDICIAL SYSTEM

A. *Serrano III* Established the Lodestar Approach As Fundamental Because of Concerns That Courts Using the Percentage Approach Were Overpaying Lawyers.

Over the intervening years, it has become uncommon to see reflected in fee decisions *Serrano III's* concerns about the general public's perception of the integrity of the bar and respect for the judicial system. References to economies of scale in class actions warranting lower fees have fallen by the wayside. The common fund doctrine's instruction, "moderation and a jealous regard for the rights of those interested in the fund" (*Trustees v. Greenough*, 105 U.S. 527, 536-37 (May 8, 1882)), has given way to a focus on the necessity of awarding attorneys' fees sufficient to incentivize entrepreneurial lawyers to file class action lawsuits.

The current system tolerates overpaying attorneys and denies class members adequate representation (and information) during the fee-setting stage of the class action settlement approval process.

1. The instant case gives this Court the opportunity to implement *Serrano III* policies in the context of modern class action litigation:

(a) attorneys' fees awarded by courts must not exceed reasonable compensation;

(b) the reasonableness of court-awarded attorneys' fee compensation is essential to the public's trust of the judiciary and the integrity of the bar;

(c) lawyers are professionals who render legal services to clients, and their compensation must be anchored to the lodestar method.

2. This Court should continue to enforce *Serrano III* with a specific rejection of the percentage-of-the-recovery approach. It should also explicitly reject in its entirety class action attorneys' fee jurisprudence that arises out of the traditional individual client, single lawyer/law firm contingent fee model.

3. This Court would next explicitly state the requirements of the lodestar methodology.

The implementation of a lodestar calculation cannot be left to each trial court judge's subjective sense of what constitutes "a careful compilation of time spent" (*Serrano III, supra,* 20 Cal.3d at 48); "[a careful] review [of] attorney documentation of hours expended" (*Ketchum, supra,* 24 Cal.4th at 1132); and the investigation sufficient to eliminate padded time (*Ketchum, supra,* 24 Cal.4th at 1132). Consistency across California courtrooms is necessary to establish the objectivity required by *Serrano III.* Courts are public institutions. The legitimacy of the exercise of judicial power to award millions, tens of millions, and even hundreds of millions of dollars in attorneys' fees to lawyers requires the utmost transparency.

B. Appointment of a Class Guardian Is Necessary.

Class Member Brennan acknowledges the burden on trial courts, when judges themselves try to perform lodestar analyses involving multiple law firms and lawyers, claims of thousands and tens of thousands of hours of legal services provided, and fee requests in the millions, tens of millions and even hundreds of millions of dollars. These burdens should not and need not be placed on the trial court judges.

The class action mechanism currently does not provide adequate representation to the class at the fee-setting stage. There is a need for an adversarial process. The class needs a representative to advocate on its behalf.

1. This Court should acknowledge that the trial court judge's roles as fiduciary protector of the class's financial interests and impartial jurist places the court in hopelessly conflicting roles.

2. Beyond that, meeting *Serrano III's/Ketchum's* requirements is unlikely when judges do not like performing lodestar analyses:

> But the primary source of dissatisfaction was that it resurrected the ghost of Ebenezer Scrooge, compelling district courts to engage in a gimlet-eyed review of line-item fee audits. *See Union Carbide*, 724 F.Supp. at 167-168.
>
> ....
>
> [W]e see no need to compel district courts to undertake the "cumbersome, enervating, and often surrealistic process" of lodestar computation. *Savoie*, 166 F.3d at 461 n.4 (quoting *Court Awarded Attorney Fees,* 108 F.R.D. at 258).

Goldberger v. Integrated Resources, supra, 209 F.3d at 48-49 and 49-50, respectively.

> Courts have little patience for the tedium of the lodestar method and many award fees without demanding a time accounting and thus are simply less scrutinizing....

Walker & Horwich, *The Ethical Imperative of a Lodestar Cross-Check, etc., supra,* at 1469.

3. Our system of justice is adversarial, but the class action fee-setting process is not.

Class members are entitled to the same litigation protections available in a $6 million dispute regarding attorneys' fees as any other person involved in a fee dispute.

4. The necessity of the appointment of a class guardian was recognized long ago.

> The appointment of a guardian for the class, therefore, provides representation for the class members at a stage of the proceedings where their interests could only be unprofitably protected, and where, not surprisingly, there is normally no class member participation.
>
> (*Haas v. Pittsburgh National Bank, supra,* 77 F.R.D. at 383; emphasis added).)

The present presumption that the trial court judge acts as class fiduciary when it comes to implementing *Serrano III's* fee award jurisprudence ignores reality.

> [W]e presume that our trial judges are well aware of their responsibilities as

> "fiduciaries" for the protection of absent class members....

Consumer Privacy Cases, 175 Cal.App.4th 545 [96 Cal.Rptr.3d 127] (1st App. Dist., Div. 5, June 30, 2009) (citation omitted).

5. This adversarial process should not be left to class member/objectors.

> [Class members] have no real incentive to mount a challenge that would result in only a "minuscule" *pro rata* gain from a fee reduction. *Continental Illinois, 962 F.2d at 573.*

Goldberger v. Integrated Resources, supra, 209 F.3d 43 at 53.

6. Fairness should guide the fairness hearing process.

Appointment of an expert for the class should be required in all cases where class counsel retain an expert. In *Laffitte*, class counsel introduced an expert's declaration to support their hourly rates.

> The supporting declaration of Richard M. Pearl, an expert on hourly rates and attorneys' fees in California, included a review of hourly rates....

Laffitte decision, 2014 Cal.App. LEXIS 1059, at *38.

If class counsel retain an expert, the class should have an expert appointed by the court to represent its interests.

C. *Thayer v. Well Fargo Bank* Represents a *Serrano III*-Compliant Lodestar Analysis.

Thayer v. Wells Fargo Bank N.A., 92 Cal. App. 4th 819 [112 Cal. Rptr. 2d 284] (1st App. Dist. Oct. 2, 2001), is an excellent example of how the scrutiny called for in *Serrano III* and *Ketchum*

can be achieved while making minimal demands on trial court time. Through an adversarial proceeding, the defendant's attorneys in *Thayer* identified billing improprieties that resulted in the court's determination that:

1. Excessive time was spent on tasks.

> Alioto and Kassof respectively sought and received compensation for almost 10 hours for work performed on April 16 in connection with this conference, which appears to have lasted about an hour.

Thayer, supra, 92 Cal.App.4th at 843.

2. Work was duplicated by the attorneys.

> This is not an isolated example of the manner in which Kassof and Alioto not only duplicated the work of counsel for plaintiffs in other cases but duplicated each other's work.

Ibid. at 844.

3. Class counsel consulted excessively.

> For example, as the Bank points out, plaintiffs' counsels' time records show that 384 hours (approximately 20% of the total hours claimed) were spent in correspondence and phone calls between and among the nine law firms representing the various plaintiffs, which is more than twice the number of hours plaintiffs' counsel spent communicating with the Bank and the trial court.

Ibid. at 841.

D. Reforms in the Documentation Presented in Support of Fee Requests Are Necessary to Meet *Serrano III/Ketchum* Requirements.

Class Member Brennan respectfully suggests that this Court identify the following documents as required submissions in a fee application in order to ensure *Serrano III* and *Ketchum* compliance. The decision as to what documentation is necessary should not be left up to individual trial court judges. Objectivity and consistency would not allow each judge to opine:

> "I do believe I have sufficient information on the number of hours that were present and that the hourly rates charged therefore were within the norm and not overstated."

Laffitte decision, 2014 Cal.App. LEXIS 1059, at *15 (*citing* RT 4/10/13, at 64:4-7).

1. Time records must be filed by class counsel.

(a) Original time slips by which lawyers keep track of their time must be filed with the court

(b) The very process of requiring disclosure of original time records in and of itself will act as a discipline on attorneys.

> "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."

Justice Louis D. Brandeis, OTHER PEOPLE'S MONEY (Stokes Publ., New York, 1914), at Ch. 5, p. 92.

(c) Lawyers working in today's marketplace (the context in which plaintiff class action lawyers justify their hourly rates

– in *Laffitte*, as high as $750 an hour) are required to submit their bills for scrutiny by clients.

> Today, all lawyers, even those in the more traditional corporate practice, must submit to the "nitpicking" of fee review.

Goldberger v. Integrated Resources, supra, 209 F.3d at 51 (emphasis added).

> Chief Justice Roberts: [J]ust because you bill a client doesn't mean that they are going to pay or that they are going to pay at what you billed them.
>
> ....
>
> [G]eneral counsel do that all the time when they get a bill from a law firm. They cut it down.

Perdue v. Kenny A., et al., 559 U.S. 542 (Apr. 21, 2010), Transcript of Oral Argument, No. 08-970, Oct. 14, 2009. at 51:12-14, and 53:24-25 (emphasis added).

Class members in class actions are entitled to the same "nitpicking" (to "cut down the bill") on their behalf.

(d) Other documentary evidence.

(i) Retainer agreements.

Retainer agreements disclose essential information about how the class will be charged for the attorneys' services, e.g., billing increments, the billing of multiple clients and how costs will be handled.

Plaintiffs' class action lawyers should be held, at a minimum, to the standard the bar imposes upon every attorney in California.

> [Regarding] [a]n attorney who contracts to represent a client on a contingency fee basis ... [t]he contract shall be in writing and shall include....:

California Business and Professions Code § 6147(a) (emphasis added).

(ii) Declarations in support of fee applications must include necessary information to allow the court to evaluate *Serrano III/Ketchum* requirements.

Declarations filed by class counsel must contain detailed information sufficient to calculate a lodestar consistent with *Serrano III's* and *Ketchum's* instructions. As recently as last year, the Supreme Court of Texas required as follows:

> Sufficient evidence includes, at a minimum, evidence "of the services performed, who performed them and at what hourly rate, when they were performed, and how much time the work required." *Id.* at 764.

Long v. Griffin, et al., No. 11-1021, 2014 Tex. LEXIS 304; 57 Tex. Sup. J. 470 (Supreme Ct., Tex. Apr. 25, 2014) (per curiam) (citation omitted).

(iii) Documentation reflecting class counsel's prelitigation efforts to settle the dispute.

Correspondence reflecting efforts of plaintiffs' counsel to settle the dispute with the defendant prior to commencing litigation is necessary.

> In making this determination [under CCP 1021.5], one that implicates the court's equitable discretion concerning attorney fees, the court properly considers all

> circumstances bearing on the question whether private enforcement was necessary, including whether the party seeking fees attempted to resolve the matter before resorting to litigation.

Vasquez v. State of California, 45 Cal.4th 243, 247-48 [85 Cal.Rptr.3d 466] (Nov. 20, 2008) (emphasis added).

(iv) Post-litigation settlement efforts.

Documentary evidence demonstrating when settlement discussions first took place after litigation commenced are essential as they disclose when risk was reduced. The issue of risk is significant as it can turn a $750 an hour fee to a $1,300 hourly fee.

(v) Monthly billing statements to the Representative Plaintiff and to the court under seal.

The information provided by Class Counsel in *Laffitte* would be deemed inadequate under California Business and Professions Code § 6148 with regard to billing information required to be provided to clients in California. Like any client in California, class members should have access to specific information of how the case progressed from a month-to-month perspective.

> For example, producing a computer-generated statement that simply has columns for "Total Services" and "Total Expenses" with dollar amounts and no itemization whatsoever, does not comply with the statute [Business & Professions Code 6148(b)]....
>
> A billing that lists a detailed itemization of services by date but fails to reveal which attorney or paralegal performed the services,

> fails to reveal how much time was expended, and fails to reveal hourly rates, also does not apply (see Example 2).

California State Bar, Arbitration Advisory 1995-02, "Standards for Attorney Fee Billing Statements," June 9, 1995 (emphasis added), *citing* A.B.A. Standing Committee on Ethics and Professional Responsibility, Formal Opinion 93-379, "Billing for Professional Fees, Disbursements and Other Expenses," Dec. 6, 1993.

(vi) Documentation filed by class counsel on the agreements amongst lawyers and law firms that make up class counsel on how work was delegated.

Agreements regarding allocation of responsibilities among law firms, attorneys, and timekeepers is directly relevant. There is a duty upon attorneys to assign work in the most efficient way to benefit the client. Class members are entitled to that information in evaluating reasonableness of class counsel's fee application.

(vii) Previous lodestar reductions.

Declarations filed by class counsel should inform the court and class members whether their lodestar fee applications have been reduced by other courts in previous class action litigation.

V.

RELATED CLASS ACTION FEE ISSUES THAT THE COURT COULD ADDRESS NOW

A. Public Policy Provides a Strong Basis for This Court to Consider Ancillary Issues That Affect Attorneys' Fees.

Class Member Brennan recognizes that these issues go beyond the question this Court certified. However, because of the rarity of parties, both capable and willing, to protect class members' and the public's interest, it could take many years to resolve these issues. That rarity can be gauged by the number of amicus briefs that are filed on behalf of class members' interests in this case.

> With regard to the last *Goldberger* factor, public policy, the district court took note of "the compelling public policy reasons for keeping an eye on attorneys' fees in class action cases."

McDaniel v. County of Schenectady, et al., 595 F.3d 411, 415 (2d Cir. Feb. 16, 2010) (citation omitted).

1. These issues are unlikely to receive this Court's review for reasons similar to the delay in resolving the issue certified by the Court.

There are no special interests standing up for the class members' interests.

2. Attorneys' fees are costs that affect the entire economy.

Those costs are simply passed down the chain to consumers and society generally, adding meaningfully to the cost of everyday goods and services.

3. The judiciary has a proprietary responsibility to ensure public confidence in its invention – the class action mechanism.

> With the millions of dollars and the very credibility of the class action device – seen by some as a socially useful law enforcement tool but seen by others as a lawyers' machine to print money....

Walker & Horwich, *The Ethical Imperative of a Lodestar Cross-Check, etc., supra,* at 1475.

B. Extend the Scope of the Court's *Laffitte* Decision Beyond the Pure Common Fund Doctrine to Include So-Called Separately Negotiated Fee Payments.

These are fee arrangements in which Class Counsel choose to not seek court approval of a fee from the common fund, but instead structure the settlement to include a separately negotiated attorneys' fee, paid not out of the common fund but directly by the Defendants.

> "'Although under the terms of [a] settlement agreement, attorney fees technically derive from the defendant rather than out of the class'[s] recovery, in essence the entire settlement amount comes from the same source. The award to the class and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the attorneys, those fees are still best viewed as an aspect of the class'[s] recovery....'"

Apple Computer, Inc. v. The Superior Court of Los Angeles, supra, 126 Cal.App.4th at 1269, *citing Lealao, supra,* 82 Cal.App.4th at 33 (emphasis added).

> "... Even where ... the parties do not specifically agree to the amount of attorney fees, the defendant usually has a fairly good idea of the range of fees that will be sought

> and the approximate amount likely to be awarded. The value of the benefit a settling defendant is willing to confer on the class – either through the establishment of a separate fund or in some other way – will therefore invariably be influenced by the amount of fees it *would* be obliged, or estimates it *would* be obliged, to pay class counsel *if it did so directly*." (*Lealao, supra,* 82 Cal.App.4th at pp. 33-37, 97 Cal.Rptr.2d 797, italics in original.)

Apple Computer, Inc. v. The Superior Court of Los Angeles, supra, 126 Cal.App.4th at 1269 (underline added).

Because these fee arrangements harm the class's ability to limit its attorneys' fee payment to no more than a reasonable fee, the court should include them in its holding on common funds.

C. Prohibit Discussion of Fees between Class Counsel and Defendants.

The Defendants have no justification for providing a "clear sailing" agreement to Class Counsel (see *Laffitte* decision, "the propriety of 'clear sailing' attorney fee agreements has been debated in scholarly circles...."[17]) or approving the attorneys' fees to be taken from the class's recovery. Indeed, Class Counsel breached their fiduciary duty in doing so. Acknowledgment of this problem has been corrected in a recent federal court decision.

> Attorney's Fees.
> To avoid collusive settlements, the Court prefers that all settlements avoid any agreement as to attorney's fees and

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[17] *Laffitte* decision, 2014 Cal.App. LEXIS 1059, at *41, *citing Consumer Privacy Cases, supra,* 175 Cal.App.4th at 553 (internal citations omitted).

> leave that to the judge. If the defense insists on an overall cap, then the Court will decide how much will go to the class and how much will go to counsel, just as in common fund cases. Please avoid agreement on any division, tentative or otherwise.

Levine v. The Entrust Group, Inc., No. C 12-03959, 2013 U.S. Dist. LEXIS 6715, at *6 (N.D. Cal. Jan. 15, 2013).

D. Change the Reasonable Hourly Rate Standard to a Competent or Capable Attorneys' Standard.

The *Laffitte* legal team was highly experienced, and arguably far more experienced than needed for many of the tasks performed. (See pages 40 and 41, *supra*). Presently, a lawyer's hourly rate is based on the individual attorney's accomplishments and years of experience.

> [R]ates from those prevailing for private attorneys of comparable skill, experience, and stature conducting noncontingent class litigation in the Los Angeles area.

Serrano v. Unruh, supra, 32 Cal.3d at 625.

The United States Supreme Court, in its recent fee decision, identified an alternative and more *quantum meruit*-oriented standard.

> [Fee awards] require specific evidence that the lodestar fee would not have been "adequate to attract <u>competent counsel</u>...."

Perdue v. Kenny A., et al., supra, 559 U.S. at 554 (citation omitted; emphasis added).

E. Eliminate Multipliers Altogether or Modify Multipliers for Contingent Risk in Class Actions.

1. The notion of significant risk in class actions is a legal fiction. The actual evidence is that almost all these cases settle. The risk of nonpayment of a fee, particularly after class certification, is near zero. Indeed, this Court recently noted:

> We encounter here an exceedingly rare beast: a wage and hour class action that proceeded through trial to verdict.

Duran v. U.S. Bank Nat'l Assoc., 59 Cal.4th 1, 12 [172 Cal.Rptr.3d 371) (May 29, 2014).

High among the concerns about excessive multipliers is the treatment of contingent risk:

> [T]here is a perception among a significant part of the nonlawyer population and even among lawyers and judges that the risk premium is too high in class action cases

Report on Contingent Fees in Class Action Litigation, January 11, 2006, 25 The Review of Litigation 458, 466 n.17 (No. 3, Summer 2006).

> That concern is amplified by our nagging suspicion that attorneys in these cases are routinely overcompensated for such things as contingency risk.

Goldberger v. Integrated Resources, supra, 209 F.3d at 57.

2. California court holdings that multipliers can range from 2 to 4 or even higher should be revisted.

It is through the use of the multiplier that courts award percentage fees under the mantle of the lodestar approach.

> Class counsel asked the court to apply a multiplier of 2.03 to 2.13.... "[M]ultipliers can range from 2 to 4 or even higher." (*Wershba v. Apple Computer, Inc., supra, 91 Cal.App.4th at p. 255.....*)

Laffitte decision, 2014 Cal.App. LEXIS 1059, at *35-*36.

Commentators have noted the defects in the multiplier concept:

> [T]he multiplier calculation is all but standardless.

Macey & Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation, etc., supra,* at 52.

> [W]hat fee is "reasonable" is easily affected by counsel's self-promoting account of the difficulty and risk of the litigation.

Walker & Horwich, *The Ethical Imperative of a Lodestar Cross-Check, etc., supra,* at 1455 (footnote omitted).

F. Limit Enhancement for Quality of Performance and Results Obtained to an Enforceable Standard of What Constitutes "Extraordinary."

Like risk and difficulty, "quality of performance" and "results achieved" are easily affected by class counsel's self-promoting account of the litigation.

CONCLUSION

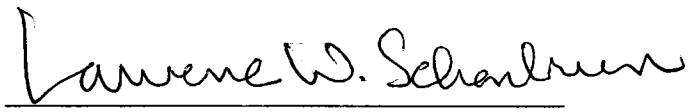
Both trial and appellate courts have a fiduciary duty to class members, and this duty is not fulfilled when the trial courts defer to class counsel, and then the appellate courts defer to the trial courts.

For the reasons stated herein, we urge this Court to take a comprehensive look at how trial courts (and appellate courts) should determine whether to approve attorneys' fee requests in class actions.

The solutions adopted by this Court should not lose sight that our legal system is meant to serve clients, and that their concerns should not be superseded by the interests of lawyers and courts.

Dated: May 27, 2015.

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the attached Appellant's Opening Brief on the Merits contains 12,673 words of proportionally spaced Times New Roman 14-point type as recorded by the word count of the Microsoft Office 2007 word processing system, and is in compliance with the type-volume limitations permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this Petition.

Dated: May 27, 2015

Lawrence W. Schonbrun

Lawrence W. Schonbrun
Attorney for Plaintiff Class Member/
Objector and Appellant David
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CERTIFICATE OF SERVICE

I declare that:

I am over the age of 18 years and not party to the within action. I am employed in the law firm of Lawrence W. Schonbrun, whose business address is 86 Eucalyptus Road, Berkeley, California 94705, County of Alameda.

On May 27, 2015, I caused to be served a copy of the following document:

APPELLANT'S OPENING BRIEF ON THE MERITS

__x__ by mail on the below-named parties in said action, in accordance with CCP § 1013, by placing a true and accurate copy thereof in a sealed envelope, with postage thereon fully prepaid, and depositing the same in the United States Mail in Berkeley, California, to the addresses set forth below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on May 27, 2015, at Berkeley, California.

Sandra Norris

Sandra Norris